IN THE Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN, PETITIONER

v.

GWINNETT COUNTY SCHOOL DISTRICT AND
WILLIAM PRESCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN L. NIEMATSU
Assistant to the Solicitor General

ROBERT S. GREENSPAN
JOHN F. BASSETTE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a private party may recover compensatory damages for an allegedly intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

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INTEREST OF THE UNITED STATES

This case presents the question whether the federal judiciary should imply a private right of action to recover compensatory legal damages for an allegedly intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The United States has a substantial interest in the scope of any implied private remedies available under Title IX. Because the subject of any private action under Title IX is a program receiving federal funding, the United States has a strong interest in assuring that private remedies do not unduly interfere with such programs. The government also has an important interest in assuring that any implied remedies conferred by the courts on private parties are consistent with the enforcement program administered by the Department of Education pursuant to Section 902 of the Act, 20 U.S.C. 1682.

In response to an order inviting the Solicitor General to submit a brief expressing the views of the United States, we filed a brief suggesting that the Court grant further review.

STATEMENT

1. From 1986 to 1988, petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia. During that period, respondent Gwinnett County School District, which operates North Gwinnett High School, received federal financial assistance.

Petitioner's complaint alleges that a former teacher at North Gwinnett High School, Andrew Hill, subjected her to a series of sexual advances culminating in several instances of intercourse. According to the complaint, other teachers and school authorities became aware of Hill's sexual approaches to petitioner and other female students, but failed to respond. In February 1988, petitioner told the school's guidance counselor of Hill's actions, and the guidance counselor in turn advised the principal. The complaint alleges that after the principal initiated an investigation, respondent William Prescott urged petitioner to drop the matter. The school district closed the investigation when Hill resigned.[1]

On the basis of Hill's activity and other officials' failure to take action against him, Count I alleges that the school district intentionally violated Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Compl. ¶¶ 39-50. Count II alleges that Hill and Prescott "wilfully and intentionally violated [Title IX] by using their position of authority to force [petitioner] to drop the investigation" and that "[b]y failing to reprimand

[1] Compl. ¶¶ 8-14, 17, 19-27, 29-31, 33-35, 37. Because the courts below dismissed the action on the basis of the complaint, its allegations must be taken as true. *Conley* v. *Gibson*, 355 U.S. 41 (1957). We lodged copies of the original complaint and an amendment to the complaint (which attaches a report by the Department of Education on the results of its investigation) with the brief that we filed at the petition stage.

or otherwise discipline Dr. Prescott, [the school district] * * * condoned and ratified the conduct of Dr. Prescott and is responsible therefor." *Id.* ¶¶ 55-56. Both counts seek compensatory damages from the school district. *Id.* ¶¶ 51, 57.[2]

2. The district court granted respondents' motion to dismiss the action for failure to state a claim. Pet. App. 15-21. Noting "that the only real issue * * * is whether compensatory relief is available under Title IX," *id.* at 17, the court concluded that a Fifth Circuit decision, *Drayden* v. *Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981), foreclosed that type of relief. Pet. App. 17, 18-19. The district court explained that *Drayden*'s holding—that the "private right of action allowed under Title VI [of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*] encompasses no more than an attempt to have any discriminatory activity ceased," 642 F.2d at 133—was also controlling with respect to Title IX.

3. The court of appeals affirmed. Pet. App. 1-14. The court noted that although it was "undisputed that an implied private right of action exists under Title IX," "the existence of a cause of action by no means assures a right to an unlimited array of remedies." Pet. App. 5-6. Like the district court, the court of appeals found that *Drayden* was "binding precedent" on the availability of damages under Title IX and that *Drayden* had not been overruled by *Guardians Ass'n* v. *Civil Service Commission*, 463 U.S. 582 (1983). Although *Guardians Ass'n*

[2] Petitioner has dropped her claim against respondent Prescott. Pet. Br. 2 n.1. The complaint also sought injunctive relief and punitive damages; those claims were abandoned in the district court and are not before this Court. See Pet. i; Pet. App. 17.

Before commencing this action, petitioner filed a complaint with the Office for Civil Rights ("OCR") of the United States Department of Education. After an investigation, OCR concluded that the school district had violated Title IX in several respects. Amended Compl., Ex. A, at 1, 7-8. Based upon the district's assurances that it would take action to correct the violations, however, OCR also determined that the district was "presently fulfilling its obligations with respect to Title IX" and closed the investigation. *Id.* at 1, 8.

"precludes a cause of action for compensatory damages for *unintentional* discrimination," the court of appeals explained, "the various opinions of a majority of the Justices simply leave[] *open* the question whether compensatory damages for intentional discrimination may be sought." Pet. App. 9.

On that question, the court found "important guidance" in Justice White's opinion in *Guardians Ass'n*, which suggested that only limited remedies should be implied for violations of statutes enacted pursuant to the Spending Clause. Pet. App. 9-10. Ruling that Title IX is Spending Clause legislation, the court stated that it would "proceed with extreme care when * * * asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy as part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary." *Id.* at 11. The court of appeals concluded that "[b]ecause * * * the Supreme Court has not overruled *Drayden* either explicitly or implicitly," it was "bound to follow *Drayden*'s mandate that damages are unavailable under Title VI and IX." Pet. App. 12.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). Consequently, the power to create remedies for violations of federal statutes rests exclusively with Congress. In our view, Congress should be deemed to exercise that power only when it acts in the manner the Constitution prescribes, by passing a law that is presented to the President for approval. *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983). The role of the courts with respect to statutory remedies, in turn, should be the same as with respect to any other issue of statu-

[3] Judge Johnson concurred specially. He would have based the decision exclusively on *Drayden*. Pet. App. 13-14.

tory construction. Courts should restrict themselves to determining whether the language of the statute authorizes the remedy sought by a plaintiff, employing techniques of statutory interpretation to clarify any ambiguity in the text. "[I]mplying a private right of action on the basis of congressional silence is a hazardous exercise, at best." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

On occasion, however, this Court has recognized implied remedies in statutes that do not expressly provide them. In one such case, *Cannon* v. *University of Chicago*, 441 U.S. 677, 717 (1979), the Court held that a private plaintiff could maintain an action under Title IX "despite the absence of any express authorization for it in the statute." This case presents a question not decided in *Cannon* or in any of this Court's subsequent decisions—whether a private plaintiff may recover compensatory legal damages for a violation of Title IX.

I. The judiciary may not award damages under Title IX in the absence of an affirmative showing that Congress authorized that form of relief. Unless a congressional intention to provide a remedy "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Karahalios* v. *National Fed'n of Federal Employees*, 489 U.S. 527, 532-533 (1989). That fundamental principle is applicable to each form of relief sought under a statute and to any extension of a previously recognized implied right of action.

The requirement of an affirmative showing of intent to confer a given remedy is grounded in limitations on the authority exercised by federal courts and in the realities of the modern legislative process. With respect to statutory remedies, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 95. Consequently, courts lack power to afford relief pursuant to a remedy that Congress has not author-

ized. Moreover, in view of the care with which Congress has fashioned statutory remedies in recent decades, there is no empirical basis for a free-floating presumption that the enactment of a statutory prohibition embodies a broad delegation to the courts to fashion whatever remedies they—as opposed to Congress—may consider appropriate. Any resort to such a presumption necessarily displaces political choices embedded in federal statutes.

II. None of the materials customarily employed in statutory interpretation—or in this Court's implied right of action cases—discloses an intention to allow private plaintiffs to recover damages for violations of Title IX. Title IX does not by its terms authorize the pursuit of *any* private remedies, and the form of its statutory prohibition is fully consistent with limiting awards to equitable relief. The legislative history reflects no expectation that damages would be available. There are indications that members of the 1972 Congress expected enforcement of Title IX to follow the form of Title VI of the Civil Rights Act of 1964, but private parties had not recovered damages under Title VI prior to 1972. Indeed, recognition of a damages remedy would contradict the legislative history of Title VI and other Titles of the Civil Rights Act of 1964.

Contrary to petitioner's contention, regulations promulgated pursuant to Title IX do not recognize a damages remedy in private actions. The regulation on which petitioner relies speaks only to the measures that may be imposed by the *agency*, not to relief recoverable in a private action, and the agency has not sought payment of compensatory damages in its enforcement of the statute. In any event, it is hardly unusual for enforcement schemes to confer greater remedial authority on governmental authorities than on private parties. None of the other grounds advanced by petitioner or her *amici*—the historical context of Title IX, subsequent enactments, or considerations regarding the relative wisdom of various possible remedies—justifies judicial implication of a damages remedy not set forth in the statute itself.

ARGUMENT

I. AN AFFIRMATIVE DEMONSTRATION OF CONGRESSIONAL INTENT IS REQUIRED FOR RECOGNITION OF AN IMPLIED DAMAGES REMEDY UNDER TITLE IX

In *Cannon*, an applicant for medical school who alleged that her applications had been rejected because of her sex brought an action under Title IX seeking declaratory, injunctive, and monetary relief.[4] Reversing the dismissal of the complaint, this Court held that the plaintiff was entitled to "maintain her lawsuit, despite the absence of any express authorization for it in the statute." 441 U.S. at 717. The Court did not consider, however, what forms of relief might be available in the newly-recognized action.

No subsequent decision of this Court has resolved the question whether a plaintiff may recover compensatory legal damages for a violation of Title IX or other similar statutes prohibiting discrimination in federally funded programs. In *Guardians Ass'n*, *supra*, a sharply divided Court upheld a judgment denying retrospective equitable relief for an unintentional violation of Title VI. In *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 630 (1984), the Court found that Section 504 of the Rehabilitation Act, 29 U.S.C. 794, "authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay," but reserved the question of "the extent to which money damages are available." 465 U.S. at 630. See also *Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984).[5]

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[4] See *Cannon* v. *University of Chicago*, 406 F. Supp. 1257, 1258 (N.D. Ill. 1976).

[5] Contrary to petitioner's suggestion (Pet. Br. 28-29), there is a well-established distinction between money damages and equitable decrees requiring the payment of money. This Court has "long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order provid-

A. As many recent decisions make clear, the question whether Title IX gives rise to an implied right of action to recover damages is "basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979). Accord, *e.g.*, *Karahalios* v. *National Fed'n of Federal Employees*, 489 U.S. at 532-533; *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 812 n.9 (1986). An affirmative demonstration of Congress's intent to confer a statutory remedy is required. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981). "Unless such 'congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Karahalios*, 489 U.S. at 532-533 (quoting *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988)).

The Court has applied that fundamental principle to each separate form of relief, see, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, and to any "extension or expansion" of a recognized right of action, *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2763 (1991). It is rooted both in the constitutional limits on the lawmaking authority of federal courts and in the realities of the modern legislative process.

1. "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 95. Except in certain areas, such as admiralty and maritime jurisdiction, the Constitution does not contemplate that federal

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ing for the reinstatement of an employee with back pay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988). There is no dispute that the relief petitioner seeks falls exclusively within the first category. All references to "damages" in this brief are to the compensatory legal damages described in *Bowen*.

courts will fashion substantive rules of decision, including those that determine the availability of remedies. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-646 (1981); *Northwest Airlines, Inc.*, 451 U.S. at 95-98. With respect to statutory remedies, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government," and the courts are "subject to the paramount authority of Congress." *Id.* at 95. Therefore, the judiciary must identify "some congressional authorization to formulate substantive rules of decision," including those governing the availability of remedies. See *Texas Industries, Inc.*, 451 U.S. at 641.

2. Even apart from the issue of power, the realities of the modern legislative process support the principle that an affirmative showing of congressional intent is required for recognition of a statutory remedy. For decades at least, Congress has devoted great care to the remedies it has provided for statutory violations. Federal statutes provide for various combinations of private and governmental remedies; voluntary conciliation and administrative and judicial proceedings; and many forms of relief—including injunctions, other equitable relief, limited monetary damages (or double and treble damages), and attorneys fees. For many years, there has been no empirical justification for a presumption that Congress intends to provide a full array of remedies for any statutory violation. "The increased complexity of federal legislation and the increased volume of federal litigation" warrant "more careful scrutiny of legislative intent." See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-377 (1982).

Moreover, the selection of statutory remedies involves inherently political choices. Congress never provides for enforcement of a statute at any cost. Rather, it chooses remedies that will strike a balance between the goals the statute is designed to advance and other competing values. Such remedial choices are potentially as contentious as questions concerning the substantive provisions of a statute. Individual members of Congress regularly disagree over whether a given remedy is necessary for effective

enforcement (or, conversely, whether it will result in unduly burdensome enforcement). The remedies provided by a particular statute frequently reflect compromises encompassing both the substantive and remedial provisions of a statute. See *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises."). It is not uncommon for proponents of broad remedies—including those who express their position in debates during the legislative process—to make concessions in order to facilitate legislation that might otherwise fail of passage.

In short, the question of what type of relief to afford for a violation of a substantive legal standard—injunctive, compensatory, penal; at the behest of the government or private parties—is no less a legislative policy judgment than the question of what the legal standard should be, and the policy judgments are closely interrelated. Congress might well decide that one standard is appropriate if enforcement is limited to government injunctive proceedings, while a different standard would be appropriate if private parties may sue for full compensatory damages. The question of what type of relief is available under a statute should therefore be subject to the same canons of construction as the question whether there exists a private cause of action at all. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 98 & n.41. Any resort to a presumption that a statute prohibiting certain conduct necessarily empowers courts to fashion whatever remedies they may deem appropriate necessarily involves the unelected judiciary in displacing political choices embodied in the statute.

B. Although petitioner appears to concede that an affirmative demonstration of congressional intent is required for recognition of a "private right of action," she argues that a diametrically different approach applies to the question of "remedies." Pet. Br. 6, 10, 14, 15. In her view, once it is established that a statute provides a "right of action," Congress is presumed to intend "all appropriate, traditional forms of judicial relief, unless it indicates otherwise." *Id.* at 11. This "in for a penny, in for a pound" approach is inconsistent with the proper role of the federal courts in our constitutional system and finds no support in this Court's more recent precedents.

1. In the context of statutory remedies, this Court has abandoned the analytical approach on which petitioner relies. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 374-378. As petitioner correctly notes, there were several cases in which this Court regarded an express grant of subject matter jurisdiction as a broad delegation of remedial discretion. The jurisdictional grant was said to provide "a general right to sue for [an invasion of federal rights]," and to empower the courts to "use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).[6] However, in the statutory context, this Court has rejected the proposition "that * * * when the federal courts have jurisdiction to hear a case, they generally are *not* restricted in their ability to afford full relief" (Pet. Br. 15).

It is now clear that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law," including statutory remedies not authorized by Congress. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. at 640-641. Indeed, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 577, the Court specifically rejected a contention that an express grant of federal jurisdiction in the Securities Exchange Act of 1934 authorized the courts to award private remedies under the Act:

> Section 27 [of the 1934 Act, 15 U.S.C. 78aa] grants jurisdiction to the federal courts and provides for

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[6] See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239-240 (1969).

venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision.

Nothing in *Guardians Ass'n* or *Darrone* breathed new life into petitioner's position. See Pet. Br. 13-14. In *Guardians Ass'n*, the holding of the Court conferred no relief on the plaintiffs; in *Darrone*, the Court reserved the question at issue here. 465 U.S. at 630.[7] Moreover, Title IX itself grants no subject matter jurisdiction over private actions, nor do its "substantive provisions" include "a general right to sue" for a violation of Section 901.[8] Whatever the merits of "implying" rights of

[7] In the context of constitutional violations, the Court has continued to regard the statutory grant of general federal question jurisdiction, 28 U.S.C. 1331, as a source of "authority to choose among available judicial remedies in order to vindicate constitutional rights." *Bush* v. *Lucas*, 462 U.S. 367, 374 (1983). See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979); *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). However, in *Davis* v. *Passman*, *supra*, and *Touche Ross & Co.* v. *Redington*, *supra*, this Court effectively restricted this principle to constitutional actions. See 442 U.S. at 241 ("the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution"); 442 U.S. at 577 (limiting *J.I. Case Co.* v. *Borak*, *supra*, and holding that a statutory remedy "must be found, if at all, in the substantive provisions of" the statute giving rise to the remedy). It should come as no surprise that the scope of judicial authority is broader with respect to the Constitution than it is in construing statutes. For these reasons, contrary to petitioner's position (Pet. Br. 14), *Davis* v. *Passman*—which involved the implication of a cause of action under the Fifth Amendment—is inapplicable to this case.

[8] By contrast, 42 U.S.C. 1983 makes persons who violate certain rights under color of state law "liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress." In *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978), the Court determined that the damage awards expressly authorized by Section 1983 should be calculated to provide compensation for actual injuries. Nothing in *Carey* bears on the question here—which is what relief is available in the face of congressional silence. See Pet. Br. 12, 19.

action may be, there is no justification for treating silence as the equivalent of the broadest imaginable grant of remedial authority. Yet that is the gist of petitioner's position.

Consistent with the Court's focus on congressional intent, the relevant question is whether Congress has authorized the plaintiff to recover a particular form of relief. The nature of the pertinent inquiry is manifest in those cases in which the Court has been called upon to determine whether a plaintiff may recover more than one form of relief. In those cases, the Court has separately analyzed the question whether Congress intended to confer each remedy sought. The Court has not proceeded in the manner suggested by petitioner—*i.e.*, determining whether a "right of action" exists and then applying a presumption in favor of all forms of relief.

In *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals had held that a plaintiff could recover both damages and injunctive relief under a statute prohibiting corporate campaign contributions. This Court addressed each form of relief separately. It held, based upon recent amendments to the statute, that the plaintiff was limited to an express statutory procedure for injunctive relief. *Id.* at 77. The Court then employed its familiar four-factor analysis to determine whether damages were available. The Court held that "*such relief* is not available with regard to a 1972 violation under [the statute] itself," *id.* at 77-78 (emphasis added), reasoning that "implication of a federal right *of damages* on behalf of a corporation under [the statute] would intrude into an area traditionally committed to state law without aiding the main purpose of [the statute]," *id.* at 85 (emphasis added).

Similarly, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15-16, a case brought under the Investment Advisors Act of 1940, the Court stated that

"what must ultimately be determined is whether Congress intended to create the private remedy asserted." The Court held that the language of Section 215 of the Act "fairly implies a right to specific and limited relief in a federal court," 444 U.S. at 18—the right to bring an action for recission and restitution—noting that "the federal courts in general have viewed such language as implying *an equitable cause of action for rescission or similar relief*," *id.* at 19 (emphasis added). The Court did not simply conclude that there was a private cause of action, with all traditional remedies. And the Court went on to rule that "the Act confers no other private causes of action, legal or equitable," *id.* at 24, rejecting the claim that Section 206 of the Act affords a private cause of action for damages. The Court declined to adopt the dissent's suggestion—indistinguishable from petitioner's position—that "[o]nce it is recognized that a statute creates an implied right of action, courts have wide discretion in fashioning available relief." *Id.* at 30 (White, J., dissenting). Instead, the Court looked at the specific remedy being sought, and asked whether *Congress* authorized that particular form of relief. In other decisions, the Court has indicated that the pertinent issue is whether Congress intended to authorize a particular form of relief, rather than a "private right of action" in the abstract.[9]

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[9] *E.g., Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 413-414 (1975) ("The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act of 1970 * * * to compel the SIPC to exercise its statutory authority for their benefit."); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 374 (describing the question presented as "whether respondents may assert an implied cause of action for damages"); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 136 (1985) ("The question presented for decision is whether, under the Employee Retirement Income Security Act of 74 (ERISA), a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims.").

2. Remarkably, petitioner also suggests (Pet. Br. 15) that her presumption would reduce "the law's uncertainty" and actually deny courts "the kind of legislative authority that they are ill-suited to exercise." Precisely the reverse is true. Application of a presumption in favor of judicial implication of a full range of remedies would not serve to diminish *ad hoc* consideration of Congress's intent, since such a presumption would still require courts to examine whether Congress intended to withhold a particular form of relief.

To the extent that the presumption resulted in recognition of additional damages remedies, judicial exercise of legislative authority would increase. Courts would be called upon, in the case of each right of action, to resolve such collateral issues as statutes of limitations, applicable standards of proof and causation, the availability of *respondeat superior* liability, the necessity for exhaustion of administrative remedies, the relation between the implied remedy and express statutory remedies, and a host of other questions.[10] Undoubtedly, the availability of implied rights of action has given rise to uncertainty.[11]

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[10] See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991) (statute of limitations); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. at 2763 (causation requirement); *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989) (*respondeat superior* liability vis-a-vis state actors and relation with express remedies); *Carlson* v. *Green*, 446 U.S. 14, 23-24 (1980) (survival of action upon plaintiff's death); *McCarthy* v. *Maddigan*, No. 90-6861 (presenting the question whether a prisoner must exhaust administrative remedies before commencing a *Bivens* action). When it enacts express remedies, Congress often supplies answers to those questions.

[11] See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991) ("In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed."); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. at 2763 (noting that causation requirement for an implied right of action is difficult to define, "for we can find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as respondents' theory of causation would entail").

But responding to that problem with petitioner's across-the-board presumption in favor of implied remedies would be using gasoline to extinguish a fire.

II. NONE OF THE MATERIALS ON WHICH AN IMPLIED RIGHT OF ACTION MAY BE BASED DISCLOSE A CONGRESSIONAL INTENTION TO AUTHORIZE AN AWARD OF DAMAGES FOR A VIOLATION OF TITLE IX

As noted, it is our position that the Congress and the courts occupy the same roles with respect to statutory remedies as they do with respect to any other "matter of statutory construction," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15. Because Congress exercises its power to make law only by enacting a statute that is presented to the President, the question whether it has enacted a remedy should be resolved by reference to the statute. *Thompson* v. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment). Techniques of statutory interpretation should be employed to clarify any ambiguity in the enactment, not to discern congressional intent apart from it.

We recognize, of course, that not all of this Court's decisions have conformed to that model. For instance, in *Cannon*, 441 U.S. at 717, the Court implied a cause of action "despite the absence of any express authorization for it in the statute." But in any event, none of the materials on which this Court has relied in implying statutory rights of action—including those invoked in *Cannon*—provides support for a damages remedy under Title IX. To the contrary, all indications are that Congress did not contemplate that damages would be available for violations of Title IX.

A. The Statutory Language

The language of Title IX is silent on the nature of the relief that may be awarded to private parties. This is hardly surprising, since the statute is silent on the very existence of a private cause of action in the first place. Mindful of the interpretive difficulties occasioned by

fleshing out a non-existent statutory provision, see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. at 2780, we believe that the statute is not framed in terms suggesting that awards of damages are essential for effective enforcement. On its face, Title IX prohibits three forms of discrimination in federally funded educational programs: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any such program. 20 U.S.C. 1681(a). It is entirely consistent with this language to limit the implied remedies available to a private party to those necessary (1) to restore a plaintiff who has been wrongfully excluded from a federally assisted program to full participation, (2) to reverse any denial of benefits and to restore any benefits wrongfully withheld, and (3) to eliminate unlawful discrimination.

To be sure, in *Cannon*, 441 U.S. at 690-691, this Court placed great emphasis on the form of Title IX's prohibition on discrimination, emphasizing that it "expressly identifies the class Congress intended to benefit" and has "an unmistakable focus on the benefited class." This Court has since indicated, however, that language identifying a protected class is insufficient, in and of itself, to support a damages remedy. In *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. at 16-17, the Court noted that two provisions of the Investment Company Act, one of which prohibited frauds or deceits "upon any client or prospective client" of an investment adviser, "were intended to benefit the clients of investment advisers." Nevertheless, the Court continued, "whether Congress intended additionally that these provisions would be enforced through private litigation is a different question," *id.* at 18, and it declined to recognize an implied right of action for damages. See also *id.* at 24.

B. The Legislative History

Petitioner and her *amici* have failed to identify even a single reference in Title IX's legislative history to the possibility of an award of damages to a private plaintiff.

We are unaware of any legislative history supporting recognition of such a remedy. Indeed, all of the pertinent materials—including those on which the Court relied in *Cannon*—are consistent only with the conclusion that Congress did not contemplate awards of damages for violations of Title IX.

1. a. In *Cannon*, this Court found that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years," 441 U.S. at 696, and reasoned, accordingly, that prior court decisions "reflect[ed] [Congress's] intent with respect to Title IX," *id.* at 697-698.[12] Significantly, in none of the cases to which the Court referred did the court sustain an award of damages for a violation of Title VI.[13] *Rolfe* v. *County Bd. of Ed.*, 282 F. Supp. 192

[12] This Court summarized the course of events that culminated in the enactment of Title IX in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 523-530 (1982).

[13] See *Gautreaux* v. *Romney*, 448 F.2d 731, 740-741 (7th Cir. 1971), later appeal, *Gautreaux* v. *Chicago Housing Auth.*, 503 F.2d 930 (7th Cir. 1974), aff'd *sub nom. Hills* v. *Gautreaux*, 425 U.S. 284 (1976) (authorizing injunctive relief for housing discrimination); *Alvarado* v. *El Paso Indep. School Dist.*, 445 F.2d 1011 (5th Cir. 1971) (reversing dismissal of school desegregation suit without addressing appropriate relief); *Gautreaux* v. *Chicago Housing Auth.*, 436 F.2d 306 (7th Cir. 1970) (upholding injunctive relief), cert. denied, 402 U.S. 922 (1971); *Shannon* v. *HUD*, 436 F.2d 809, 822-823 (3d Cir. 1970) (authorizing declaratory and injunctive relief regarding location of a public housing project); *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967) (affirming denial of preliminary injunction against highway construction project), cert. denied, 390 U.S. 921 (1968); *Anderson* v. *San Francisco Unified School Dist.*, 357 F. Supp. 248, 255 (N.D. Cal. 1972) (awarding injunctive and declaratory relief to remedy "reverse discrimination" in employment); *Blackshear Residents Org.* v. *Housing Auth.*, 347 F. Supp. 1138, 1149-1150 (W.D. Tex. 1972) (awarding injunctive relief directed at segregated public housing); *Hawthorne* v. *Kenbridge Recreation Ass'n*, 341 F. Supp. 1382 (E.D. Va. 1972) (awarding injunctive relief directed at discrimination by private association receiving SBA loan); *Southern Christian Leadership Conference, Inc.* v. *Connolly*, 331 F. Supp. 940 (E.D. Mich. 1971) (denying motion to dismiss action for declaratory relief

(E.D. Tenn. 1966), aff'd, 391 F.2d 77 (6th Cir. 1968), which received only a "see also" citation in *Cannon*, 441 U.S. at 697 n.21, is no exception.[14] Thus, if the Congress that enacted Title IX was guided by the "state of the law at the time the legislation was enacted," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at

regarding discrimination in SBA loan program); *Hicks* v. *Weaver*, 302 F. Supp. 619 (E.D. La. 1969) (granting preliminary injunction); *Gautreaux* v. *Chicago Housing Auth.*, 296 F. Supp. 907, 914-915 (N.D. Ill. 1969) (granting injunctive relief directed at segregated housing); *Rolfe* v. *County Bd. of Ed.*, 282 F. Supp. 192 (E.D. Tenn. 1966) (dicta) (granting reinstatement and back pay for discrimination in employment in action brought under 42 U.S.C. 1983 and Title VI), aff'd, 391 F.2d 77 (6th Cir. 1968); *Gautreaux* v. *Chicago Housing Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (denying motion to dismiss action challenging allegedly segregated public housing); *McGhee* v. *Nashville Special School Dist. No. 1*, 11 Race Rel. L. Rep. 698 (W.D. Ark. 1966) (equitable remedies for segregated school system); *Lemon* v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847, 852 (5th Cir.) (granting injunctive relief against segregated school system), cert. denied, 388 U.S. 911 (1967).

[14] Petitioner takes us to task for describing the monetary relief awarded in *Rolfe* as "back pay," rather than as "damages." Pet. Br. 25 & n.16. However, in the context of Title VII—the principal federal statutory prohibition on employment discrimination—back pay is a form of equitable relief, and does not constitute legal damages. See B. Schlei & P. Grossman, *Employment Discrimination Law* 1452 & n.153 (2d ed. 1983); C. Sullivan, M. Zimmer & R. Richards, *Employment Discrimination* § 15.1, at 53-54 (2d ed. 1988). It is for that reason that the right to a jury trial is inapplicable to Title VII actions. See *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979).

Moreover, while the court of appeals in *Rolfe* did use the term "damages," it did not mention Title VI, let alone describe it as the source of any monetary relief. Unlike the instant case, *Rolfe* was brought under 42 U.S.C. 1983 as well as Title VI, and the court of appeals referred only to Section 1983. The district court's passing reference to Title VI also did not identify that statute as the basis for monetary award. Even if it were reasonable to assume that Congress took its cue from *Rolfe* (and it is not), that case would not support petitioner's position.

378, it would not have expected the courts to award legal damages based upon violations of the statute.

b. The fact that judicial decisions may not have rejected awards of damages (see Pet. Br. 24)—since that issue was not presented—provides no support for a contrary conclusion. For there is evidence that Congress did not intend to provide damages under Title VI; the absence of any decisions suggesting otherwise would have been entirely consistent with that expectation.

During the course of Congress's consideration of legislation ultimately enacted as the Civil Rights Act of 1964, Senators Keating and Ribicoff proposed adding a provision giving private parties the right to enforce Title VI. Under that proposal, a "person aggrieved" by a violation of that statute would have been authorized to commence "a civil action or other proper proceeding *for preventive relief*, including an application for a permanent or temporary injunction, restraining order, or other order" (emphasis added).[15] Senator Keating explained that the purpose of his proposal was to allow suits to terminate funding or to require "specific performance of the nondiscrimination requirement" in Title VI.[16] The proposal was not adopted.

In *Cannon*, 441 U.S. at 716 n.51, this Court found that the omission of the Keating amendment from Title VI did not foreclose recognition of any private right of action under that statute or Title IX. The Court reasoned that the omission could have been part of a compromise, in which Section 601 was redrafted in a form "more conducive to implication of a private remedy against a discriminatory recipient * * *, but * * * arguably *less* conducive to implication of a private remedy against the Government (as well as the recipient) to compel

[15] 109 Cong. Rec. 15,375 (1963) (quoted in *Cannon*, 441 U.S. at 715 n.50).

[16] 109 Cong. Rec. 15,376 (1963) (remarks of Senator Keating). See Hearings Before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess. 349-352 (1963). See generally *Cannon*, 441 U.S. at 713-716 & nn. 49-52.

the cutoff of funds." 441 U.S. at 716 n.51. Be that as it may, it is most unlikely that any member of Congress would have foreseen that such a compromise would lead to more expansive implied relief than even the most enthusiastic supporters of private remedies had advocated.[17]

None of the express private rights of action included in the 1964 Civil Rights Act provided for awards of damages. Title II authorized persons aggrieved by discrimination in public accommodations to commence "a civil action for preventive relief" and to recover attorneys fees. 42 U.S.C. 2000a-3. Title VII authorized injunctions against discrimination, reinstatement, and back pay, but not damages. 42 U.S.C. 2000e-5(g).[18] It is very doubtful that Congress could have intended to grant broader relief by implication in Title VI than it conferred expressly in any other provision of the 1964 Civil Rights Act. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S.Ct. at 2780 ("We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections.").

c. The limitation on the monetary relief recoverable under Title VII is especially significant in view of the fact that the same Congress that enacted Title IX extended Title VII to educational institutions. See Pub. L. No. 92-261, § 3, 86 Stat. 103-104 (deleting the exemption for such institutions from the 1964 Act). In most cases,

[17] Ordinarily, of course, little significance can be attached to Congress's failure to enact a given provision. However, consistent with the unique approach to statutory interpretation that has been brought to bear on implied rights of action, this Court has relied on that type of inaction. *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 538-539 (1984). See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21-22; *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. at 146.

[18] Titles III and IV reserved private rights of action, but did not create them. 42 U.S.C. 2000b-2, 2000c-8.

persons alleging that they have been victimized by employment discrimination on the basis of race, color, or national origin in federally funded programs may not bring an action under Title VI. See 42 U.S.C. 2000d-3. Their remedies lie under Title VII, which is limited to equitable relief. Under petitioner's theory, however, plaintiffs suing under Title IX for employment discrimination on the basis of sex in federally funded programs would be entitled to legal damages. See *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). If petitioner is correct, then, the 1972 Congress would be deemed to have provided broader relief to employees of educational institutions who were victimized by sex discrimination than by race discrimination. That very implausible result should not be attributed to Congress. See *Shuttleworth* v. *Broward County*, 649 F. Supp. 35, 37 (S.D. Fla. 1986).

2. In *Cannon*, the Court also relied on Section 718 of the Education Amendments of 1972, 86 Stat. 369, as evidence that Congress intended to allow enforcement of Title IX by private parties. See 441 U.S. at 699-701 & nn. 25-28. Section 718, which has since been repealed, authorized an award of attorneys fees in an action under Title VI upon a finding that the action was necessary "to bring about compliance" with the statute. Consistent with the legislative history of Title VI and the actions that had been brought prior to 1972, that language is evocative of equitable relief, but not damages.

C. Administrative Enforcement of Title IX

Petitioner contends that a regulation promulgated by the former Department of Health, Education, and Welfare, 34 C.F.R. 106.3(a), and administrative practice in the enforcement of Title IX, support her claim to damages. Pet Br. 26-27. Neither the regulation nor administrative practice provide any support for a private damages remedy.

1. As its language makes clear, the regulation has nothing to do with the remedies available to private

parties in judicial proceedings. Rather, it directs recipients of federal financial assistance to take remedial action mandated by *the Department of Education* when *the Department* has found a violation (34 C.F.R. 106.3(a)):

> If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

It is, of course, not unusual for enforcement schemes to distinguish between relief that might be sought by the government and that might be available at the behest of private parties. See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (EPA may seek civil penalties for wholly past violations of Clean Water Act, while citizens suing under citizen-suit provisions may seek penalties only in conjunction with equitable relief).

The remedial orders referred to in the regulation are the end result of administrative proceedings. The regulations permit individuals to file administrative complaints alleging violations of Title IX.[19] (Petitioner filed an administrative complaint commencing such a proceeding before she brought this action. See Amended Compl., Ex. A.) The Office for Civil Rights of the Department of Education is then responsible for conducting an investigation. If OCR concludes that an institution receiving federal financial assistance has violated Title IX, it notifies the institution of the finding and attempts to resolve the matter by informal means—typically by specifying measures that it finds appropriate to bring the institution back into compliance with the statute. See 34 C.F.R.

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[19] 34 C.F.R. 100.7(b). See 34 C.F.R. 106.71 (making procedures promulgated under Title VI applicable to Title IX).

100.7(d).[20] If the matter is not resolved informally, the agency may commence proceedings to suspend or terminate federal financial assistance. 34 C.F.R. 100.8-100.9. Such a suspension or termination may be made contingent on specified terms and conditions, enabling the recipient to avoid a fund cutoff by taking steps to bring itself into compliance with Title IX. 34 C.F.R. 100.10(f).[21]

The remedial steps that the Department has directed in accordance with these procedures have included make-whole equitable relief, such as back pay and restoration of benefits wrongfully withheld. See *Romeo Community Schools* v. *HEW*, 600 F.2d 581, 583 (6th Cir.), cert. denied, 444 U.S. 972 (1979). We are advised, however, that the Department does not condition continuation of financial assistance on payment of legal damages. In any event, Title IX expressly empowers the Department of Education to secure compliance with the statute by terminating or suspending federal assistance or "by any other means authorized by law." 20 U.S.C. 1682. There is no evidence that Congress intended to authorize private litigants to obtain whatever relief is available to the agency charged with enforcing the statute.

2. In fact, recognition of an implied right of action for damages would be inconsistent with a prominent feature of the government's express remedy. The statute directs the government not to commence enforcement proceedings until it has "advised the appropriate person or persons of the failure to comply with [Title IX] and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1682. The evident purpose of this scheme is to secure compliance without unduly divert-

[20] In this case, for instance, OCR found that the school district had violated regulations promulgated under Title IX by failing to establish proper grievance procedures for complaints of sexual harassment. Amended Compl., Ex. A, at 7. That violation was resolved, however, by means of an assurance that the district had implemented proper procedures. See *id.* at 8, 9.

[21] A recipient is given the opportunity for a hearing and may seek judicial review. 34 C.F.R. 100.9, 100.11.

ing resources from educational programs to litigation. In our view, the Congress that made the government's express remedy for a violation of Title IX contingent upon the failure of efforts to obtain voluntary compliance with the statute should not be deemed to have saddled educational programs with the burden of litigating private actions seeking damages proximately caused by a past violation.[22]

D. Other Considerations

1. Lacking any evidence that any member of the 1972 Congress actually contemplated awards of damages under Title IX, petitioner argues that the "legal context" prevailing when the statute was enacted warrants attributing the requisite intention to the legislature. See Pet. Br. 21-26. She argues that Congress must have anticipated that the availability of private rights of action would be determined with regard to pre-1972 cases, under which the denial of any remedy was "the exception rather than the rule" (*id.* at 22).

There is no indication that when Title IX was enacted any member of Congress actually relied on this Court's pre-1972 case law regarding implied remedies. Since *Cannon*, moreover, this Court has repeatedly applied its prevailing approach—which requires some evidence of an actual intention to create an implied remedy—to statutes

[22] See *Lieberman* v. *University of Chicago*, 660 F.2d 1185, 1188 (7th Cir. 1981) (awards of legal damages to selected beneficiaries of federal financing programs would threaten "a potentially massive financial liability"), cert. denied, 456 U.S. 937 (1982).

Petitioner and her *amici* make much of the fact that this case involves an allegation of "intentional" discrimination. However, that characterization rests on the assumption that Hill's state of mind (or the state of mind of those who failed to act on information regarding his misconduct) may be imputed to the school district. The availability of *respondeat superior* liability is a serious, unresolved issue. See *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989).

enacted decades earlier than Title IX.[23] Indeed, if petitioner's approach to legal context were the law, it would have foreclosed the new approach that petitioner claims should not be given effect in this case. As the author of the opinion in *Cannon* observed in one of those cases, "I think it is more important to adhere to the analytical approach the Court has adopted than to base my vote on my own opinion about what Congress probably assumed in 1890." *California* v. *Sierra Club*, 451 U.S. at 301 (Stevens, J., concurring).

That course is well-founded. The courts lack constitutional power to recognize a statutory remedy that Congress has not authorized. They cannot properly circumvent that limitation by assuming that Congress must have expected the judiciary to recognize the remedy even in the absence of an affirmative demonstration of congressional intent. Moreover, in fashioning its current approach, the Court has responded to changes in Congress's practice regarding statutory remedies. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 374-377. There is no justification for applying a pre-

[23] See, *e.g.*, *Touche Ross & Co.* v. *Redington*, *supra* (Securities Exchange Act of 1934); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra* (Investment Advisors Act of 1940); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754 (1981) (Davis Bacon Act of 1931); *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra* (Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963); *California* v. *Sierra Club*, 451 U.S. 287 (1981) (Rivers and Harbors Appropriation Act of 1899); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra* (Sherman Act of 1890 and Clayton Act of 1914); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act, a statute enacted in 1948 and substantially amended in 1972, and Marine Protection, Research, and Sanctuaries Act of 1972); *Daily Income Fund, Inc.* v. *Fox.*, 464 U.S. 523 (1984) (Investment Company Act of 1940). Significantly, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 577, this Court declined to extend the analysis of *J.I. Case Co.* v. *Borak*, *supra*, even though it had earlier been used to imply a remedy under the very statute at issue.

sumption here that is at odds with Congress's way of doing business.[24]

2. Petitioner (Pet. Br. 10) and her *amici* suggest that other statutes passed after Title IX support her claim to a damages remedy under Title IX. Those statutes do not shed any light on the question whether the 1972 Congress that enacted Title IX intended to authorize that form of relief. Each of those statutes, moreover, is entirely consistent with the view that damages are unavailable under Title IX. The Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, withdraws Eleventh Amendment immunity from the States in actions under Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, and authorizes recovery from States of "remedies (including remedies both at law and in equity) * * * to the same extent as such remedies are available * * * against any public or private entity other than a State." The statute only provides for equal treatment of States and other defendants; it does not indicate what remedies are available from them. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 329 n.22 (1981) (savings clause preserving other remedies tells nothing about what other remedies may be available).[25] Likewise, the pertinent

[24] Even on its own terms, the inference that petitioner advocates is tenuous at best. Would it have been reasonable for any single member of Congress to have assumed, in 1972, that a statute would be construed in 1991 by reference only to decisions prior to 1972? Would any single member of Congress have been safe in assuming that his position on the meaning of those precedents and their continuing applicability would be shared by others? Would this Court be on firm ground in imputing meaning to silence on the basis of its answers to those questions? See *Thompson* v. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment) ("It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.").

[25] The statute was enacted in response to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), which held that Section 504 of the Rehabilitation Act did not abrogate

provisions of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28-31, define the scope of the federally funded "programs" and "activities" in which discrimination is prohibited. See *Grove City College* v. *Bell*, 465 U.S. 555 (1984).

3. Finally, petitioner and her *amici* argue that damages have traditionally been favored over equitable relief, that any refusal to award damages would leave those in her position without compensation, that Congress could not have visualized a distinction between make-whole equitable relief (such as backpay) and damages, and that damages are best suited to accomplish the goals of Title IX. Pet. Br. 27-32. There is no evidence that Congress shared petitioner's assessment of those respective remedies.

To the contrary, in the one federal funding statute that does specify a private remedy for discrimination in federally funded programs, Congress provided only for injunctions. See 42 U.S.C. 6104(e). In Title VII, Congress limited victims of sex discrimination in employment, such as sexual harassment, to equitable relief, including backpay. The wisdom of that limitation is among the most contentious issues in the current debate over proposed civil rights legislation. Title VII is not exceptional in limiting private parties to specified forms of monetary relief. See *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 148 (although ERISA provides for recovery of withheld benefits, no recovery of "extracontractual damages caused by improper or untimely processing of benefit claims"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 24 n.14 (construing Investment Advisors Act to provide for restitution, but not damages). A decision to grant equitable relief, but not consequential damages, cannot fairly be

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Eleventh Amendment immunity. That immunity is available against forms of relief other than damages. *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

dismissed as unprincipled. *Burlington School Comm.* v. *Dept. of Ed.*, 471 U.S. 359, 370-371 (1985). It would not be arbitrary to conclude that judicial relief under Title IX should be focused on eliminating discrimination from federally funded programs, while avoiding damages awards that could reduce the resources available to all participants in the programs.

The point is that reasonable members of Congress could well differ on such questions. There is no evidence that the 1972 Congress resolved those questions in favor of a damages remedy under Title IX and, *sub silentio*, enacted that preference into law. Congress did not create an express private right of action for damages, nor is there any indication it intended the judiciary to imply one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

ROBERT S. GREENSPAN
JOHN P. SCHNITKER
Attorneys

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